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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN NELSON EDWARDS,

Defendant and Appellant.

2d Crim. No. B218155
(Super. Ct. No. F427071)
(San Luis Obispo County)

Brian Edwards appeals from the trial court's judgment granting respondent's petition for his continued involuntary treatment as a mentally disordered offender (MDO). Appellant claims that the evidence is insufficient to support a finding that his mental disorder caused or aggravated the commission of the underlying crime. We affirm.

Factual and Procedural Background

In January 2009 respondent filed a petition for appellant's continued involuntary treatment as an MDO pursuant to Penal Code section 2970.¹ The petition stated that appellant had previously been committed for treatment as an MDO after having been convicted of assault with a deadly weapon. (§ 245, subd. (a)(1).) The previous commitment was due to expire in May 2009.

¹ All statutory references are to the Penal Code.

Appellant waived his right to a jury trial. At a court trial, two psychiatrists testified on respondent's behalf. One of the psychiatrists testified that appellant's commitment offense was "an assault on staff at a state hospital." The psychiatrist opined that this offense was attributable to appellant's "severe mental disorder."

At the conclusion of the trial, the court found that appellant "has a severe mental disorder that is not in remission or cannot be kept in remission and [that he] represents a substantial danger of physical harm to others." The court ordered that appellant be recommitted for treatment as an MDO for a period of one year.

Discussion

Six criteria must be met for a prisoner's initial commitment as an MDO.² One of those criteria is that the prisoner's "severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison." (§ 2962, subd. (b).) After a prisoner's initial commitment as an MDO, three criteria must be met for his recommitment: "the court must find (1) that the parolee has a severe mental disorder; (2) that the disorder is not in remission or cannot be kept in remission without treatment; and (3) that the parolee represents a substantial danger of physical harm to others by reason of the disorder. (§ 2972, subd. (c).)"

(*People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1075, fn. 2)

In *Merfield* this court concluded: "An inmate whom the BPT [Board of Parole Terms, now Board of Parole Hearings] determines to be an MDO has a right to a court hearing on the six criteria only following the initial commitment determination. Once the time has passed for that first determination and proceedings have been instituted to extend the commitment, the inmate may only challenge the BPT's determination of his or

² The six criteria are as follows: "(1) the prisoner has a severe mental disorder; (2) he used force or violence in committing the underlying offense; (3) his severe mental disorder was a cause or aggravating factor in his commission of that offense; (4) the disorder is not in remission or capable of being kept in remission without treatment; (5) he was treated for the disorder for at least 90 days in the year prior to his parole; and (6) as a result of his disorder, he represents a substantial danger of physical harm to others. (§ 2962.)" (*People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2)

her current mental status. (§ 2966, subd. (c).) This rule applies irrespective of whether the first commitment resulted from the inmate's acceptance of the BPT's determination or from a hearing conducted in the trial court." (*People v. Merfield, supra*, 147 Cal.App.4th at p. 1077.)

Thus, an MDO has only one opportunity to challenge the criterion that his "severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which [he] was sentenced to prison." (§ 2962, subd. (b).) That opportunity is afforded at the initial commitment proceeding. Issues related to this criterion cannot be litigated at a subsequent recommitment proceeding. (*People v. Merfield, supra*, 147 Cal.App.4th at pp. 1075-1077.) This criterion "concern[s] past events that once established, are incapable of change." (*People v. Francis* (2002) 98 Cal.App.4th 873, 879.) Appellant, therefore, is precluded from arguing that the evidence presented at the recommitment proceeding is insufficient to support a finding that his mental disorder caused or aggravated the commission of the underlying crime of assault with a deadly weapon.³

People v. Hayes (2003) 105 Cal.App.4th 1287, is distinguishable. In *Hayes* the appellate court considered the merits of the defendant's challenge to a recommitment order on the ground that his underlying offense "is not a qualifying crime under the MDO law." (*Id.*, at p. 1288.) Unlike appellant, the defendant in *Hayes* did not argue that his severe mental disorder was not a cause of or aggravating factor in his commission of the underlying offense. Furthermore, in *Hayes* the People conceded that the defendant was not precluded from raising the qualifying crime issue in connection with his continued commitment. (*Id.*, at p. 1289, fn. 2.) The *Hayes* court, therefore, did not determine whether the defendant could raise this issue. Finally, in *Hayes* the defendant's challenge did not involve any factual issues. The defendant contended "that his conviction under section 452 for recklessly setting a fire cannot support a commitment under the MDO law

³ The issue of what matters can be litigated in an MDO recommitment proceeding is pending before our Supreme Court in *Lopez v. Superior Court*, S172589, 173 Cal.App.4th 266, review granted July 29, 2009.

as a matter of law." (*Id.*, at p. 1290, italics added.) Appellant's challenge, on the other hand, involves factual issues that he could have litigated in the initial commitment proceeding.⁴

Disposition

The judgment (order of recommitment) is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

⁴ The record does not disclose whether in the initial commitment proceeding appellant filed a petition pursuant to section 2966, subdivision (b), requesting a trial to determine whether he met the MDO criteria.

Dodie A. Harman, Judge
Superior Court County of San Luis Obispo

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